RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

July 2009

Volume 120

Supreme Court Issues Pregnancy Discrimination Decision

Does it violate the Pregnancy Discrimination Act to follow a pension rule that was in effect before the PDA went into effect? The Supreme Court recently said no.

AT&T grants pensions and other benefits based on a seniority system, which is calculated as the employee's period of service to the company minus uncredited leave time. In the 1960s and early 1970s, AT&T employees who were on "disability" leave received full service credit for their entire periods of absence. Those who took "personal" leaves of absences received a maximum service credit of 30 days. Women who took time off for pregnancy-related reasons were deemed to be on personal, not disability, leave, and thus lost some service credit.

In 1977, AT&T modified its policies to say that women were entitled to disability benefits and service credits for up to six weeks of pregnancy-related leave. But if their leaves lasted more than six weeks, the additional leave was deemed to be personal, not disability-related, and thus they received no service credit for that time.

In 1978, Congress passed the Pregnancy Discrimination Act, making it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." The next year, AT&T amended its policies again, providing that employees on pregnancy leave would receive the same benefits as employees on other types of temporary leave. But the company did not make any retroactive adjustments to the service credit calculations of women who had been subjected to the pre-Pregnancy Discrimination Act policy.

Four women who worked for AT&T sued. Each of them had taken maternity leave before Congress passed the Pregnancy Discrimination Act and before AT&T amended its policies. Each of them received less service credit for maternity leave than she would have received on the same leave for a disability, and each thus had a smaller pension than she otherwise would have received.

The Court upheld AT&T policies. Justice David Souter, writing for the majority, said "Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA," citing special treatment afforded seniority systems under Title VII. He said the only way for the plaintiffs to win would be "to read the PDA as applying retroactively to re-characterize the acts as having been illegal when done," an argument he said was not supported by the legislative history of the PDA.

Justice Ginsberg, the only woman currently on the Court, wrote a dissent which was joined by Justice Breyer. She said that she "would hold that AT&T committed a current violation of Title VII when it did not totally discontinue reliance upon a pension calculation premised on the

(Continued on Page 2)

BHRC
PO BOX 100
Bloomington IN 47402
349-3429
human.rights@bloomington.in.gov

USERRA Discrimination Complaint Fails

The Uniformed Services Employment and Reemployment Rights Act (USERRA) forbids discrimination in employment based on military service. As more people serve in the military and then seek to reenter the work force, it may be invoked more frequently in the past few years. In April of this year, it was invoked unsuccessfully in an Indiana case.

Rick Madden was hired by Rolls Royce for a temporary position as a process engineer. His supervisor, Robin Savin, who had graduated from Purdue, was impressed when Madden told him that he had a degree in aeronautical engineering from Purdue.

Madden worked for Rolls Royce for 90 days on a trial basis. After the trial period was over, Savin decided to terminate Madden. Madden, a member of the US Air Force Reserve, claimed that Savin fired him because Savin knew he soon would be called for active duty. Later, Madden was rejected for an engineering job with Data Systems and Solutions, a supplier owned by Rolls Royce. Madden said the hiring officer referred to his military obligations when he denied him the job offer. He sued both Rolls Royce and DS&S, lost at the trial level, appealed and lost again.

The Court said that if an employer has two reasons for taking an adverse action against an employee, and only one of those reasons is forbidden by USERRA, and the employer is able to show that it would have taken the adverse action even without the forbidden reason, the employer wins.

The employers were able to show the Court that Madden had lied when he said he was a Purdue graduate. He had attended Purdue, but flunked out. Rolls Royce was able to show that Madden's work had been "dangerously incompetent." The Court said that "Allowing someone who is not an engineer to do engineering work on aircraft parts, when he had lied about his credentials and confirmed the lie by his poor performance of the job for which he had been hired but was not qualified would be the height of irresponsibility and could get the employer into serious trouble."

The lessons of this case apply in many fair employment cases: document problems with work performance, conduct background checks, check references and credentials and teach supervisors to avoid making comments that could be interpreted as being discriminatory.

The case is Madden v. Rolls Royce Corporations, 563 F3d 636 (7th Cir 2009). ♦

Supreme Court (Continued from page 1)

notion that pregnancy-based classifications display no gender bias." She said deciding for the plaintiffs would not have resulted in a large cost to AT&T, as the plaintiffs' class "comprises only women whose pregnancy leaves predated April 29, 1979 and whose employment continued long enough for their pensions to vest. The periods of service involved are short - several weeks or some months, not years. And the cost of equal treatment would be spread out over many years, as eligible women retire."

Justice Ginsberg decried the Supreme Court decision, General Electric Co. v. Gilbert, 429 U.S. 125 (1976) that said that discrimination on the basis of pregnancy is not a form of sex discrimination, a decision that led Congress to pass the Pregnancy Discrimination Act. She quoted a decision from that era: "In response to an employer's argument that its disadvantageous maternity leave and pregnancy disability income protections policies were not based on sex, the Court commented: '[I]t might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt: If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind.'"

She said she would construe the PDA to embrace the plaintiffs' complaint, "and would explicitly overrule Gilbert so that the decision can generate no more mischief."

The case is AT&T Corporation v. Hulteen, 2009 WL 1361539 (U.S. Supreme Court 5/18/09). ♦

EEOC Settles National Origin Discrimination Case

The U.S. Equal Employment Opportunity Commission recently settled a case against Skilled Healthcare, which owns several nursing homes and assisted living facilities. A group of Latino employees who worked for Skilled Healthcare said they were subjected to harassment, different terms and conditions of employment, promotion, compensation and treatment through the implementation of an English-only rule that was enforced only against Latinos.

The lawsuit arose from a charge of discrimination filed by a monolingual janitor named Jose Zazueta. Skilled Healthcare fired him for violating its English-only rule, but took no action against employees at other facilities who spoke Tagalog at work.

The EEOC said it identified 53 current and former Latino employees who worked for Skilled Healthcare and who were subjected to disparate treatment and harassment based on their national origin and shared language. According to the EEOC, some workers were prohibited from speaking Spanish to Spanish-speaking residents of the facility or disciplined for speaking Spanish in the parking lot while on breaks. The EEOC said that Skilled Healthcare gave its Latino employees less desirable work than their non-Latino counterparts, paid them less and promoted them less often.

Olophius Perry, the district director for the EEOC in Los Angeles, said that "Employees and applicants should never be discriminated against because of their language or country of origin. To single out one language but not another for harsher treatment is old-fashioned discrimination."

Under the negotiated settlement, Skilled Healthcare will pay $450,000, provide annual training to its employees on national origin discrimination, educate facility residents and patients about employee rights, designate an EEO monitor and report annually to the EEOC regarding its employment practices for three years. ♦

Race Discrimination In Atlanta

Typically, discrimination cases tend to be subtle and sometimes hard to prove. In 2009, we don't often see cases of blatant, explicit discrimination. But the U.S. Equal Employment Opportunity Commission has filed a lawsuit that it alleges is such a case.

According to the lawsuit, John Wieland Homes and Neighborhoods, Inc., an Atlanta-based home builder, intentionally assigned African American sales agents to housing communities based on the race of the surrounding community. The lawsuit said that because of these practices, African American agents ended up earning significantly less than their white counterparts who were assigned to housing communities with white populations and higher-priced homes.

The lawsuit began when a white human resources representative, Michelle Mouser, filed a discrimination complaint with the EEOC, claiming that she was forced to participate in discriminatory practices or be fired. She was responsible for recruiting sales agents to work onsite at new housing communities that were under construction. She said she was explicitly told that Wieland's goal was to hire and assign employees whose race corresponded with the predominant population of each community. She said she was told she could not hire qualified African American sales agents for communities with predominantly white populations.

Mouser complained about the discriminatory practices to management, who did nothing. She did not want to participate in illegal hiring practices and felt forced to resign.

The EEOC, in its lawsuit, is seeking back pay and compensatory and punitive damages for Mouser as well as for the affected African American sales agents. It is also seeking injunctive relief designed to stop the discrimination and keep it from recurring. ♦

Free Workshops Available On Making Businesses Accessible

The City of Bloomington has received funding from ADA-Indiana and the Indiana Governor's Council for People with Disabilities to provide two workshops. The City's Council for Community Accessibility applied for the funding for its project entitled "Making Businesses Accessible: If We Build it Right, They Will Come!"

Workshops will be offered on July 28, for government building inspectors, and on August 19, for architects, builders and contractors. Both workshops begin at 8:30 a.m. at City Hall, 401 N. Morton Street, Bloomington, and include free lunch.

The purpose of the workshops is to provide information about what new and renovated businesses are required to do by federal and Indiana law to be accessible to people with disabilities. Workshops will target those who approve plans and inspect construction, and those who design, build and renovate buildings. By offering the workshops, the City is helping businesses understand how to be fully accessible from the start, at the design and construction stages.

Presenters will be representatives from the Great Lakes ADA Center, a program of the Department of Disability and Human Development at the University of Illinois at Chicago, and from the U.S. Access Board. The Great Lakes ADA Center provides information, materials, technical assistance and training on the Americans with Disabilities Act of 1990 (ADA). The Great Lakes ADA Center's service area is designated as Region 5 and is one of ten regional centers funded by the National Institute on Disability and Rehabilitation Research (NIDRR), a division of the U.S. Department of Education. The U.S. Access Board is an independent Federal agency devoted to accessibility for people with disabilities.

For more information about the workshops, contact Craig Brenner, Special Projects Coordinator, City of Bloomington Community & Family Resources Department, 349-3471 or brennrc@bloomington.in.gov or Barbara McKinney, BHRC, 349-3429 or mckinneb@bloomington.in.gov. ♦

City of Bloomington
Human Rights Commission
PO Box 100
Bloomington IN 47402